92-228

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

OTHELLO ARMSTRONG, *et al.*,

Petitioners,

vs.

OWENS-ILLINOIS, INC.,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are plaintiffs denied their rights of Equal Protection and Due Process under the Fourteenth Amendment when the state's highest appellate court fails to provide them the same notice and opportunity to be heard on the issue of availability of punitive damages which was provided to litigants of a case argued the same day, but are then retroactively subjected to the court's ruling in the other litigant's case?

2. Does retrospective application of a decision by the highest appellate court of Maryland violate the Due Process Clause of the Fourteenth Amendment when that decision operates to deprive a plaintiff of punitive damages recoverable under preexisting law?

LIST OF PARTIES

The parties involved in the lower court were Othello Armstrong and Forrest Wood, *et ux.*, Loretta, petitioners and Owens-Illinois, Inc., respondent.

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No.

In The

Supreme Court of the United States

October Term, 1992

OTHELLO ARMSTRONG, *et al.*,

Petitioners,

vs.

OWENS-ILLINOIS, INC.,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the judgment and opinion of the Court of Appeals of Maryland, *Owens-Illinois v. Armstrong*, 326 Md. 107, 604 A.2d 47 (1992), which reversed the judgment of both the Circuit Court of Baltimore City and the Court of Special Appeals of Maryland. Both the trial court and the

intermediate appellate court awarded petitioners $1,000,000 each in punitive damages. This award was predicated on established Maryland law which, at the time, permitted punitive damages to be assessed against a defendant in a negligence or strict liability suit upon a finding of "implied malice," *i.e.*, proof, by a preponderance of the evidence, that the defendant acted with wanton and reckless disregard for the rights of others.

The Court of Appeals of Maryland reversed the punitive damage awards when, in another asbestos case argued the same day, *Owens-Illinois, Inc. v. Zenobia,* 325 Md. 420, 601 A.2d 633 (1992), it announced new law requiring a finding of "actual malice," *i.e.*, conduct of the defendant characterized by evil motive, intent to injure, ill will, or fraud, or, in the context of products liability, actual knowledge of a defect and deliberate disregard of the consequences in order for punitive damages to be recoverable. The court also required that plaintiffs prove actual malice by the more difficult standard of clear and convincing evidence.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked on the basis of 28 U.S.C. § 1257(3) because rights arising under the Constitution of the United States are claimed.

The opinion and judgment of the Court of Appeals of Maryland were issued on April 7, 1992. This petition is filed within 90 days of that date as required by 28 U.S.C. § 2101(c). Sup. Ct. R. 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Othello Armstrong and Forrest Wood, both diagnosed as suffering from asbestosis, filed suit in the Circuit Court for Baltimore City against Owens-Illinois and other manufacturers, installers and suppliers of asbestos-containing insulation products. Alleging negligence and strict liability in tort, petitioners claimed that the defendant companies were liable to them for failing to warn of the potential health risks associated with exposure to asbestos products.

At trial, the jury awarded both petitioners compensatory damages. In accordance with established Maryland precedent, the jury was instructed that it could assess punitive damages against the defendants if it found, by a preponderance of the evidence, that they had acted with implied malice, *i.e.*, wanton disposition, grossly irresponsible to the rights of others, extreme recklessness and utter disregard for the rights of others. Applying this standard, the jury awarded each petitioner $1,000,000 in punitive damages.

Owens-Illinois appealed the punitive damage award to the Court of Special Appeals of Maryland. That court, also applying the implied malice standard, and requiring that it be proven by a preponderance of the evidence, upheld the award.

Owens-Illinois petitioned the Court of Appeals of Maryland to review the case and certiorari was granted on September 16, 1991. Around the same time period, Owens-Illinois was defending

itself in another asbestosis suit, *Owens-Illinois v. Zenobia,* 325 Md, 420, 601 A.2d 633 (1992). The Court of Appeals of Maryland granted certiorari in that case on July 26, 1991, including in that writ an order that the *Zenobia* attorneys brief the issue of what the correct standard for the allowance of punitive damages should be in Maryland for negligence and strict liability cases. (Appendix A, 1a). Oral argument for both cases took place on January 7, 1992. During oral argument, attorneys in the *Zenobia* case, because they had already briefed the issue, addressed the punitive damage issue. Attorneys in the *Wood-Armstrong* case did not present oral argument on this issue because, at the time, they were not aware that the applicable standard for applying punitive damages in Maryland was at issue. Not until two days after oral argument did the court issue an order requiring attorneys in the *Armstrong* case to brief the punitive damage issue. (Appendix B, 5a).

Petitioners' brief on the punitive damage issue was submitted on February 12, 1992, as required by the order. On February 14, 1992, two days after petitioners submitted their brief, the Court of Appeals of Maryland filed a 61-page opinion in the *Zenobia* case, changing Maryland law by requiring plaintiffs to prove actual malice (Appendix D, 8a), by clear and convincing evidence (Appendix E, 10a), in order to recover punitive damages in a negligence or strict liability case. This new standard was not only applied in *Zenobia*, but was also applied to *Armstrong* and another asbestos case heard the same day. Other than to those three cases, the new standard for awarding punitive damages in Maryland was applied prospectively to trials in progress or commencing after the *Zenobia* decision. (Appendix F, 11a). As a result of the retrospective application of the new law in the *Armstrong* case, Othello Armstrong's and Forrest Wood's $1,000,000 punitive damage awards were reversed and the cases remanded for new trials. (Appendix C, 7a).

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS WERE DENIED THE PROTECTIONS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN THE COURT OF APPEALS OF MARYLAND FAILED TO PROVIDE THEM WITH NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO REVERSING THEIR PUNITIVE DAMAGE AWARDS.

The Fourteenth Amendment of the United States Constitution prohibits governmental actions which deprive "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. Procedural due process therefore requires that whenever the government takes its citizens' property, there is a right to a fair prior procedure to contest the basis for, and the legality of such action. The "state must adhere to previously declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken." John E. Nowak & Ronald D. Rotunda, *Constitutional Law,* 487-88 (4th ed. 1991). In the instant case, petitioners were entitled, under established Maryland precedent, and by decision of both a trial and an intermediate appellate court, to $1,000,000 each, in punitive damages. In order for the state's highest court to change the law on punitive damages, apply the new law retroactively, and thereby take away petitioners' awards, the court owed petitioners a minimal amount of due process.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Central*

Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In the instant case, the Court of Appeals of Maryland did not notify petitioners that it was contemplating changing Maryland's punitive damage law, far less applying the changed standard to them, until after petitioners had already made oral argument on the merits of their case. Attorneys in the *Zenobia* case were ordered, *prior* to oral argument, in the order granting certiorari, to brief the punitive damage issue. (Appendix A, 1a). *Zenobia's* attorneys were at least put on notice that the court contemplated changing that law. As such, attorneys in *Zenobia* were given an opportunity to address the issue during oral argument. When petitioners gave oral argument, on the same day, immediately following *Zenobia,* they had no notice of any potential changes in the law of punitive damages, nor that such changes would be applied to their cases retroactively. Therefore, petitioners never received an opportunity to present their objections orally, even though punitive damages in petitioners' cases totalled $2,000,000 and in *Zenobia* amounted to only $237,500. Rather, two days after oral argument, petitioners were ordered to brief the issue on when punitive damages should be permitted in Maryland. (Appendix B, 5a). Two days after the brief was submitted, the Court of Appeals of Maryland issued a 61-page decision changing punitive damage law and applying it to petitioners. Under the Due Process Clause petitioners were not provided with notice to voice their objections to the change in punitive damage law. Given the fact that the court's 61-page opinion in *Zenobia,* ruling petitioners' case, was issued only a scant two days after petitioners filed their brief, it is doubtful that the brief was even considered.

Similarly, this Court has held that when the state deprives an individual of property, it should first ensure that the individual is granted a hearing prior to the governmental action. *See, e.g., Snidach v. Family Finance Corp.,* 395 U.S. 337, 89 S. Ct. 1820 (1969); *Bell v. Burson,* 402 U.S. 535, 91 S. Ct. 1586 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970) (terminating

basic welfare benefits). In the instant case, petitioners were never given an oportunity, through oral argument, to address the approriate-punitive-damage issue even though the new standard was applied retroactively to their case thereby depriving both of them of their punitive damage awards.

Of course, it is the invariable procedure of the Court of Appeals of Maryland to grant *certiorari* only with respect to discrete issues. These are either set out in the order or as presented in the petitions. Thereafter, these issues are first briefed and *then* argued orally. Here, the prior notice of issues requirement was ablated and no opportunity to argue orally, on issues previously briefed, was ever allowed. This non-procedure is unique in Maryland appellate court history.

II.

THE COURT OF APPEALS OF MARYLAND BY APPLYING THE *ZENOBIA* DECISION RETROACTIVELY TO PETITIONERS' CASE AND THEREBY DEPRIVING THEM OF THEIR PUNITIVE DAMAGE AWARDS VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court has held that the Due Process Clause of the Fourteenth Amendment prohibits retrospective civil legislation when the consequences are harsh and oppressive. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17, n.3 (1977). The Constitution further reflects a bias against retroactive laws by prohibiting both the Congress and the states from enacting any *ex post facto* laws. U.S. Const. art. I, § 9, cl. 3, § 10, cl. 1.

As Nowak and Rotunda explain in their treatise *Constitutional Law, supra* at 407:

> The courts traditionally have opposed retroactive

> legislation not only because such legislation tends to create instability but also because the legislature can benefit or harm disfavored classes of citizens more easily with retrospective laws than it can with prospective laws.

Retroactively applying the law announced in *Zenobia* to petitioners' cases would have harsh and oppressive consequences. In filing these suits, petitioners substantially relied on the established precedents relating to punitive damage liability in Maryland. Applying these precedents, petitioners won final judgments in the trial court and the intermediate appellate court. When the court of appeals wrote its *Zenobia* opinion, it realized it was creating new law. For this reason the court applied the new punitive damage standards to "trials commencing and trials in progress on or after the date this opinion is filed." *Zenobia,* 325 Md. 420 at 470, 601 A.2d 633 at 657 (1992). The only other cases which the court applied the new law to was *Zenobia* itself, petitioners' case and a third case heard by the court on the same day. Thus, even though petitioners' trials were completed nearly one year prior to the *Zenobia* opinion, they were, nontheless, subjected to the new law and deprived of $2,000,000 in punitive damages. Applying the new law to petitioners, but not to other cases in which the trials had been completed, indeed led to harsh and oppressive consequences and, therefore, violated due process.

The fact that court-made law, as opposed to legislative law, served to remove petitioners' entitlement to punitive damages in the instant case is a litle relevance in determining its constitutionality. As this Court stated in *Bouie v. City of Columbia,* 378 U.S. 347, 353-54 (1963):

> If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state supreme court is barred by the Due Process Clause from achieving the same result by judicial construction.

III.

EVEN IF THE COURT OF APPEALS OF MARYLAND PROPERLY APPLIED THE LAW ANNOUNCED IN *ZENOBIA* TO PETITIONERS' CASE, IT SHOULD HAVE UPHELD THE PUNITIVE DAMAGE AWARDS.

Assuming, *arguendo,* that the court of appeals was correct in applying the new law announced in *Zenobia,* it should, nonetheless, have upheld the punitive damage awards rather than remanding the cases for new trials. Recently, in *Rubin v. State,* 325 Md. 552, 602 A.2d 677 (1992), the Court of Appeals of Maryland held that a trial court had improperly admitted testimony in the trial of an accused murderer. An agent of the defendant's attorney had violated the attorney-client privilege by telling police, and the trial court, that he viewed bullets in the client's purse immediately following the murder. This information was used by police to obtain a search warrant which led to the discovery of even more damaging evidence, and was also used at trial to convict the defendant. While ruling that the agent violated the attorney-client privilege, the court, nonetheless, upheld the conviction by determining that the remaining evidence of guilt was so overwhelming that admission of the privileged testimony was not prejudicial beyond a reasonable doubt. In the instant case, the evidence of actual malice was "clear and convincing," yet, in this civil case, the court ordered a retrial. What the court did in *Rubin,* a criminal case, should, *a fortiori,* have been done in the case at bar. The record of the intermediate appellate court in this case was replete with direct evidence of actual malice, evidence which is incontestable since it came entirely from defendant's authenticated record. *Cf., Wood-Armstrong,* 87 Md. App. 699 at 720-23, 591 A.2d 544 at 553-555 (1991); *Johnson v. Celotex Corp., Owens-Illinois,* 899 F.2d 1281 at 1288 (1990) (wherein, the Court of Appeals for the Second Circuit reviewed evidence against the same defendants in the instant case to uphold

an award of punitive damages).

The evidence introduced by petitioners at trial is sufficient to find, by clear and convincing evidence, "(1) actual knowledge of the defect on the part of [Respondents], and (2) the [Respondent's] conscious or deliberate disregard of the foreseeable harm resulting from the defect," *i.e.*, the punitive damage standard required under *Zenobia. Zenobia,* 325 Md. 420 at 462, 601 A.2d 633 at 653 (1992). (Appendix D, 8a). As the intermediate appellate court, the Court of Special Appeals observed, petitioners, at trial, produced evidence that respondents "possessed substantial knowledge that Kaylo was, or was likely to become, dangerous." *Owens-Illinois v. Armstrong,* 87 Md. App. 699 at 720, 591 A.2d 544 at 553-54 (1991). (Appendix G, 13a). The court of special appeals opinion is replete with evidence that respondents knew of the dangers of asbestos, including that they could be charged with knowledge, as early as 1935, that asbestos could cause life-threatening diseases in humans, *id;* and that in March, 1943, Saranac Laboratories had directly informed respondents that Kaylo "had all the ingredients of a first class hazard," *id.;* and that the same laboratory, in 1948, informed respondents that Kaylo was capable of causing abestosis and should be treated industrially as a hazardous dust. *Id.* The opinion also quotes a letter mailed to respondents in 1948 which accompanied the laboratory's report:

> [O]ur findings regarding Kaylo are less favorable than anticipated. However, since Kaylo is capable of producing asbestosis, it is better to discover it now in animals than later in industrial workers. Thus the company, being forewarned, will be in a better position to institute adequate measures for safeguarding exposed employees and protecting its own interests.

Id. Citing these, and numerous other examples, the Court of

Special Appeals of Maryland established, by clear and convincing evidence the first prong of *Zenobia:* that the defendants had actual knowledge of their product's defects.

The court of special appeals opinion also sets forth ample and incontestable evidence proving the second prong of *Zenobia:* the respondents' conscious or deliberate disregard of the foreseeable harm resulting from the defect. Despite having knowledge of the health dangers of their asbestos products, "[i]t is undisputed that [respondent] never warned [petitioners] about the dangers of asbestos exposure from Kaylo products." *Armstrong, supra,* 87 Md. App. 699 at 716, 591 A.2d 544 at 552 (1991). Furthermore, petitioners produced evidence that they were exposed to clouds of asbestos that covered their bodies. *Armstrong,* 87 Md. App. 699 at 722, 591 A.2d 544 at 554. Because the Court of Appeals of Maryland had all of this evidence available to it, there was no reason to subject petitioners to the time and expense of a new trial. Rather, the court should have exercised its authority to weigh the evidence and uphold the lower courts' holdings as it did in *Rubin.*

CONCLUSION

For the foregoing reasons, petitioners pray that this Honorable Court grant this petition for writ of certiorari and, upon review, reverse the decision of the Court of Appeals of Maryland and affirm the punitive damages award to petitioners in the trial court and the court of special appeals.

Respectfully submitted,

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APPENDIX A — COURT OF APPEALS OF MARYLAND ORDER REQUIRING *ZENOBIA* ATTORNEYS TO BRIEF PUNITIVE DAMAGE ISSUE

IN THE COURT OF APPEALS OF MARYLAND

Petition No. 140

September Term, 1991
(No. 1580, Sept. Term 1989,
Court of Special Appeals

OWENS-ILLINOIS, INC., et al.

WILLIAM ZENOBIA, SR., et al.

ORDER

The court having considered the petition for writ of certiorari filed by Owens-Illinois, Inc. and Porter-Hayden Company, the petition of MCIC Inc. and the conditional cross-petition of William Zenobia, Sr., et al. and the answers filed thereto, it is this 26th day of July, 1991.

ORDERED that the petitions for writ of certiorari and the cross-petition for writ of certiorari be, and they are hereby granted; and it is further

ORDERED that in addition to the questions presented for review in the petitions and cross-petition, the parties are to address in their briefs and at oral argument the following question:

In light of the concurring opinion of Judges

Appendix A

> Eldridge, Chasanow, and Cole in *Schaefer v. Miller,* 322 Md. 297, 312-32, 587 A.2d 491 (1991), what should be the correct standard under Maryland law for the allowance of punitive damages in negligence and product liability cases *i.e.*, gross negligence, actual malice, or some other standard. *See, e.g., Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972); *Davis v. Gordon,* 183 Md. 129, 36 A.2d 699 (1944).

and it is further

ORDERED that said case shall be transferred to the regular docket as No. 66, September Term, 1991; and it is further

ORDERED that counsel shall file briefs and printed record extract in accordance with Rules 8-501 and 8-502, petitioners' briefs and record extract to be filed on or about forty (40) days from the date the record is docketed in this Court; and it is further

ORDERED that this cases shall be set for argument during the January session of Court on the same day that the case of *Eagle-Picher Industries Inc. et al. v. Paul Balbos, Personal Representative of the Estate of Leslie Balbos et al.,* No. 22. September 1991 Term is argued.

s/ Robert C. Murphy
Chief Judge

Appendix A

In the Court of Appeals
of Maryland

Petition Docket No. 140

September Term, 1991
(No. 1580, Sept. Term 1989
Court of Special Appeals)

OWENS-ILLINOIS, INC., et al.

v.

WILLIAM ZENOBIA, et al.

WRIT OF CERTIORARI

STATE OF MARYLAND, to wit:

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS:

WHEREAS, *Owens-Illinois, Inc., et al. v. William Zenobia, Sr., et al.*, No. 1580, September Term, 1989 was pending before your Court and the Court of Appeals is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED to cause them to be sent without delay to the Court of Appeals of Maryland, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS the Chief Judge of the Court of Appeals of

Appendix A

Maryland this 26th day of July, 1991.

s/ Alexander L. Cummings
Clerk
Court of Appeals of Maryland

APPENDIX B — COURT OF APPEALS OF MARYLAND ORDER REQUIRING *WOOD-ARMSTRONG* ATTORNEYS TO BRIEF PUNITIVE DAMAGE ISSUE

In the Court of Appeals of Maryland

No. 77

September Term, 1991

OWENS-ILLINOIS, INC.

v.

OTHELLO ARMSTRONG et al.

ORDER

The Court having considered the briefs and oral argument in the above captioned case, it is this 9th day of January, 1992

ORDERED, by the Court of Appeals of Maryland, that the parties file supplemental briefs and address in those briefs the following question:

> In light of the concurring opinion of Judges Eldridge, Chasanow, and Cole in *Schaefer v. Miller,* 322 Md. 297, 312-32, 587 A.2d 491 (1991), what should be the correct standard under Maryland law for the allowance of punitive damages in negligence and product liability cases *i.e.,* gross negligence, actual malice, or some other standard. *See, e.g., Smith v. Gray Concrete Pipe Co.,* 267 Md. 149, 297 A.2d 721 (1972); *Davis v. Gordon,* 183 Md. 129, 36 A.2d 699 (1944).

and it is further

ORDERED that the Petitioner's supplemental brief shall be filed on or about January 27, 1992 and the Respondents' supplemental brief shall be filed on or before February 12, 1992.

s/ Robert C. Murphy
Chief Judge

APPENDIX C — EXCERPT OF COURT OF APPEALS OF MARYLAND OPINION, *OWENS-ILLINOIS V. ARMSTRONG*, 326 MD. 107, 128-29, REVERSING PETITIONERS' PUNITIVE DAMAGE AWARDS AND APPLYING THE NEW LAW ANNOUNCED IN *ZENOBIA*

* * *

PUNITIVE DAMAGES

The jury award of punitive damages in the instant case must be reversed. In *Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A.2d 683 (1992), we stated "the 'clear and convincing' standard of proof for punitive damages in tort cases applies to the instant cases [and] to the two cases heard by us the same day . . ." One of the two cases heard the same day as *Zenobia*, we shall reverse the awards of punitive damages and remand the cases for new trials on the issue of punitive damages. The plaintiffs will be required to prove their entitlement to punitive damages by clear and convincing evidence based on the standards set forth in *Zenobia*.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR NEW TRIALS LIMITED TO THE ISSUE OF PUNITIVE DAMAGES. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID TWO-THIRDS BY PETITIONERS AND ONE-THIRD BY RESPONDENTS.

APPENDIX D — EXCERPT OF COURT OF APPEALS OF MARYLAND OPINION, *OWENS-ILLINOIS V. ZENOBIA*, 325 MD. 420, 462, SETTING FORTH ACTUAL MALICE STANDARD TO BE APPLIED FOR PUNITIVE DAMAGES.

* * *

We believe that in products liability cases the equivalent of the "evil motive," "intent to defraud," or "intent to injure," which generally characterizes "actual malice," is actual knowledge of the defect and deliberate disregard of the consequences. Therefore, in order for actual malice to be found in a products liability cases, regardless of whether the cause of action for compensatory damages is based on negligence or strict liability, the plaintiff must prove (1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect.

The knowledge component, which we hold is necessary to support an award of punitive damages, does *not* mean "constructive knowledge" or "substantial knowledge" or "should have known." More is required to expose a defendant to a potential punitive damages award. The plaintiff must show that the defendant *actually* knew of the defect and of the danger of the product at the time the product left the defendant's possession or control."[23] *See Sch. Dist. of Independence v. U.S. Gypsum,*

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23. Actual knowledge, however, does include the wilful refusal to know. *See, e.g. State v. McCallum*, 321 Md. 451, 456-461, 583 A.2d 250, 253-255 (1991) (Chasanow, J., concurring) ("[k]nowledge exists where a person believes that it is probable that something is a fact, but deliberately abuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth.") Therefore, a defendant cannot shut his eyes or plug his ears when he is presented with evidence of a defect and thereby avoid liability for punitive damages.

750 S.W.2d 442, 446 (Mo.App.1988) ("No. Missouri case has permitted submission of punitive damage claim in a strict products liability case on the theory that the defendant should have known of a dangerous defect in its product").[24]

Furthermore, the plaintiff is required to show that, armed with this actual knowledge, the defendant consciously or deliberately disregarded the potential harm to consumers. Professor Owen suggest the term "flagrant indifference." D.Owen, *Punitive Damages in Product Liability Litigation, supra,* 74 Mich.L.Rev. at 1369. We prefer the characterization "conscious or deliberate disregard," and emphatically state that negligence alone, no matter how gross, wanton, or outrageous, will not satisfy this standard. Instead the test requires a bad faith decision by the defendant to market a product, knowing of the defect and danger, in conscious or deliberate disregard of the threat to the safety of the consumer.

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24. For cases involving instances where the plaintiffs demonstrated the actual knowledge required, *see, e.g., Fischer v. Johns-Manville Corp.* 103 N.J. 643, 672, 512 A.2d 466, 481 (1986)("the evidence supports a finding that Johns-Manville knew of the dangers created by its product. Not only did it fail to warn users of the serious health hazards associated with exposure to asbestos, it actually took affirmative steps to conceal this information from the public"); *Tatuan v. A.H. Robins Co.*, 241 Kan. 441, 484, 736 P.2d 1210, 1240 (1987)("Far from simply being 'grossly negligent' in marketing the Dalkon Shield, there was substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield for year after year").

APPENDIX E — EXCERPT OF COURT OF APPEALS OF MARYLAND OPINION, *OWENS-ILLINOIS V. ZENOBIA*, 325 MD. 420, 469, STATING CLEAR AND CONVINCING STANDARD OF EVIDENCE TO BE APPLIED IN PUNITIVE DAMAGE AWARDS

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Use of a clear and convincing standard of proof will help to insure that punitive damages are properly awarded. We hold that this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm. Consequently, in *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.

APPENDIX F — EXCERPT OF COURT OF APPEALS MARYLAND OPINION, *OWENS-ILLINOIS V. ZENOBIA*, 325 M.D. 420, STATING THAT NEW LAW TO BE APPLIED TO OTHER TWO CASES HEARD SAME DAY AND TRIALS IN PROGRESS OR COMMENCING AFTER DATE OPINION ISSUED

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We now turn to the matter of the effective date of our holdings with respect to punitive damages.

Until today, under Maryland common law a plaintiff in a tort case was required to establish by a preponderance of the evidence those circumstances which would authorize the allowance of an award for punitive damages. By changing this standard of proof to clear and convincing evidence, we have not overruled any particular Maryland cases on the ground that they were wrongly decided at the time. Instead, we have exercised our constitutional authority to change the common law. *See Murphy v. Edmonds,* 325 Md. 342, 362, 601 A.2d 102, 112 (1992); *Julian v. Christopher,* 320 Md. 1, 9-11, 575 A.2d 735, 789 (1990); *Wildermuth v. State,* 310 Md. 496, 529, 530 A.2d 275, 291-292 (1981); *Ireland v. State,* 310 Md. 328, 331-332, 629 A.2d 365, 366-367 (1987); *Kelley v. R.G. Industries, Inc.,* 304 Md. 124, 140, 497 A.2d 1143, 1150-1151 (1985), and cases there cited.

Recently in *Julian v. Christopher, supra,* 820 Md. at 10-11, 575 A.2d at 739, we reiterated the principle that "[o]rdinarily decisions which change the common law apply prospectively, as well as to the litigants before the court. *Williams v. State,* 292 Md. 201, 217, 438 A.2d 1301, 1309 (1981)." Thus in *Boblitz v. Boblitz,* 296 Md. 242, 275, 462 A.2d 506, 522 (1983), we changed the common law by abrogating interspousal immunity in negligence cases and held that the change was applicable to the case then

before the Court and to causes of action accruing after the date of our decision.

Where, however, a change in the common law does not affect the elements of a cause of action but relates to requirements at a trial, we have held that the change applies "to cases where the trials . . . commence after the date of our decision in the present case." *Jones v. State,* 302 Md. 153, 161, 488 A.2d 184, 189 (1985). *See also, e.g., Williams v. State, supra,* 292 Md. at 219, 438 A.2d at 1310; *Lewis v. State,* 286 Md. 705, 716, 404 A.2d 1073, 1079 (1979).

Therefore, the "clear and convincing" standard of proof for punitive damages in tort cases applies to the instant cases, to the other two cases heard by us the same day (Nos. 22 and 77), and to all trials commencing and trials in progress on or after the date this opinion is filed.

APPENDIX G — EXCERPTS OF COURT OF SPECIAL APPEALS (INTERMEDIATE APPELLATE COURT) OPINION, *OWENS-ILLINOIS V. ARMSTRONG,* 87 MD. APP. 699, 720-23, ESTABLISHING RESPONDENT'S KNOWLEDGE OF ASBESTOS HEALTH DANGERS

* * *

Appellees produced evidence that appellant possessed substantial knowledge that Kaylo was, or was likely to become, dangerous. By 1935, the medical and industrial literature had established that asbestos could cause life-threatening diseases in humans. It is reasonable to charge appellant with this knowledge. *See Balbos,* 84 Md.App. at 77, 578 A.2d 228.

In February 1943, appellant contacted Saranac Laboratories to have them examine the health hazards of airborne dust from Kaylo insulation products to employees "in the plant where the material is made or where it may be sawed to desired dimensions, and also considered from the standpoint of applicators or erectors at the point of use." One month later, Saranac Laboratories notified appellant that the composition of Kaylo suggested that it "had all the ingredients of a first class hazard." Appellant instructed Saranac Laboratories to continue its investigations.

In November 1948, Saranac Laboratories issued to appellant an interim report which stated that Kaylo is capable of causing asbestosis in test animals and "should be handled indistrially as a hazardous dust." The interim report also stated that "very small numbers of [asbestos] fibers are capable of producing asbestosis," that the development of asbestosis may be delayed and that a Kaylo safety program was necessary. The interim report was forwarded to appellant with a cover letter which stated that Kaylor is capable of causing asbestosis and that Kaylo must be regarded as a potentially hazardous material. The cover letter closed with

the following statement:

> [O]ur findings regarding Kaylo are less favorable than anticipated. However, since Kaylo is capable of producing asbestosis, it is better to discover it now in animals than later in industrial workers. Thus the company, being forewarned, will be in a better position to institute adequate control measures for safeguarding exposed employees and protecting its own interests.

In a letter from Saranac Laboratories dated June 1, 1950, addressed to W.G. Hazard of the Industrial Relations Division of Owens-Illinois Glass Company, Saranac warned that

> at this time . . . the findings permit [a conclusion that] Kaylo dust on inhalation by experimental animals . . . does produce the asbestotic type of reaction in the lungs and, therefore, we believe every precaution should be taken to minimize exposure of industrial employees.

Again, on February 7, 1952, Saranac, in the letter transmitting its final report,[4] stated:

> The results of the investigation with animals show that Kaylo dust is capable of producing a peribronchiolar fibrosis typical of asbestosis . . .

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4. In Balbos we noted, "[t]he report, however, as does other available medical literature, only documents hazards involved with heavy exposure to the product's dust generated during the manufacturing and application process." *Balbos*, 54 Md.App. at 77-78, 578 A.2d 228.

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> Although extrapolation from animal to human experience is difficult, nevertheless the results of the study indicate that every precaution should be taken to protect workers against inhaling the dust. Therefore, control measures should be directed to reducing the amount of atmospheric dust, especially at those points of operation where dust is generated. Our report of May 29, 1951, concerning the industrial hygiene survey may be of help to you in this regard.

Finally, on October 5, 1955, in an intra-company memorandum, appellant expressed its knowledge that Kaylo dust could cause asbestosis.

Appellees also produced evidence that appellant exhibited a gross indifference to the dangers of Kaylo products. As early as 1946, the generally accepted safe level of exposure was five million particles of asbestos dust per cubic foot of air (mppcf). Five mppcf is invisible to the unaided eye. Fifteen mppcf in perfect light can barely be seen by the unaided eye. Five mppcf, however, was intended as a guide and not as a fine line between safe and dangerous conditions.

Appellees produced evidence that they were exposed to clouds of asbestos dust that covered their bodies. Wood testified that the dust "would fly like snowflakes" all over the place. When a valve was broken, the dust would circulate all around and on everybody close to it. Armstrong testified that the dust from the insulation

> "was on your arms, on your clothes, in your nose and your eyebrows and mustache . . . and your

hair, wherever your hair wasn't covered, it was there."

In November 1952, appellant began a safety program for its workers in the warehouse and shipping departments of its Berlin, New Jersey Kaylo Plant which included chest x-rays, the installation of exhaust equipment and the distribution of respirators. No safety program, however, was suggested or initiated for workers involved in the application of Kaylo products. Appellant also failed to place warnings on its Kaylo products and did not distribute any literature warnng about the known hazards of asbestos exposure from Kaylo products. In fact, it may be inferred reasonably that appellant took steps to limit the publication of the dangers of Kaylo products. In 1952, before Saranac Laboratories published its final report on asbestos exposure from Kaylo products, it submitted to appellant a draft copy with the statement that in publishing the report "reference will be made only to hydrous calcium silicate and not to 'Kaylo' thus the interest of your company will be safeguarded. Of course, the final manuscript will be forwarded for your review before being released to the publisher." In the 1955 intra-company memorandum, previously mentioned, appellant referred to the published report of Saranac Laboratories with the statement, "The names 'Kaylo' and 'Owens-Illinois' appear nowhere in the article. It's completely anonymous."

In *Balbos,* 84 Md.App. 10, 578 A.2d 228, we reversed the jury's award of punitive damages against Owens-Illinois, Inc. based on a documentary record that differed by only one document from that in the case *sub judice,* however, *Balbos* is distinguishable from this case. First, the plaintiff employees in *Balbos* did not work with or in proximity to Kaylo products, but relied on the drift theory to demonstrate exposure. *Id.* at 75-79, 578 A.2d 228.

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This type of asbestos exposure was not tested directly by Saranac Laboratories. In the case *sub judice,* appellees worked with or near Kaylo products in enclosed rooms where clouds of dust were generated. This was similar to the test conditions in the Saranac Laboratory experiments. Second, the employees in *Balbos* did not contend that they were "exposed to levels of asbestos in excess of levels that were generally accepted as safe at the time." *Id.* at 77, 578 A.2d 228. In the case *sub judice* appellees and their co-workers testified to exposures to Kaylo dust which were many times the accepted safe level. Based on the foregoing, and unlike *Balbos,* the appellants here demonstrated through direct evidence that Owens-Illinois had substantial knowledge of the dangers inherent in the use of their product and that, based on their failure to act on that knowledge, they were grossly indifferent to those dangers to the extent that their failure to act amounted to a wanton and reckless disregard for the plaintiffs. Therefore, we hold the evidence sufficient to sustain the court's denial of appellant's motion for judgment and the jury's award of punitive damages.